United States Department of Labor
Employees' Compensation Appeals Board

I.J., Appellant	)	
and	)	**Docket No. 20-0812**
	)	**Issued: October 19, 2020**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Memphis, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 2, 2020 appellant filed a timely appeal from a February 11, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from OWCP's last merit decision, dated February 14, 2008, to the filing of this appeal,[1] pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[3]

[1] For final adverse decisions of OWCP issued prior to November 19, 2008, the Board's review authority is limited to appeals which are filed within one year from the date of issuance of OWCP's decision. *See* 20 C.F.R. § 501.3(d)(2) (2008).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the February 11, 2020 decision, OWCP received additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 12, 2007 appellant, then a 69-year-old crane operator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including excessive noise on his job site. He noted that he first became aware of his condition and first realized that it was caused or aggravated by his federal employment on November 13, 1985.

In a September 18, 2007 development letter, OWCP informed appellant that it had received no evidence in support of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP also requested that appellant provide any medical reports or audiograms from physicians who have treated him for his hearing problems. In a separate development letter of even date, it requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding his occupational disease claim. OWCP afforded both parties 30 days to respond.

Appellant submitted an August 1, 1966 health qualification placement record with an illegible signature which identified the physical requirements of the employment factors of his job as a crane operator.

Appellant submitted certificates of a medical examination dated from June 28, 1994 to March 25, 1997, in which Dr. Louis Tyler, Board-certified in family medicine, and Dr. David McMillan, Board-certified in emergency medicine, made note of the functional requirements of appellant's work duties as a crane operator and checked a box marked "No" to indicate their opinion that appellant would have no limitations in performing his work duties.

Appellant submitted audiogram results dated from July 29, 1976 to March 6, 1998 signed by multiple registered nurses.

Appellant also submitted multiple position descriptions of his employment duties as a crane operator, deck hand, laborer, weaver, and warehouseman and made note of the noise exposure he experienced from large generators, diesel engines, dredge motors, "Caterpillar" motors, steam cookers, and trucks.

In response to OWCP's September 18, 2007 development questionnaire, appellant submitted a statement in which he explained that he first realized that his hearing loss was due to employment exposure after his physician informed him in 1985 that his hearing was decreasing. He provided that the last day he was exposed to hazardous noise at work was April 1, 1999. Appellant asserted that he had no prior ear or hearing problems and that he had no hobbies that would have contributed to his hearing loss.

On January 10, 2008 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record to Dr. Edgar Franklin, Board-certified in otolaryngology, for a second opinion evaluation to determine the nature and extent of appellant's employment-related conditions.

In his January 24, 2008 medical report, Dr. Franklin reviewed the SOAF, history of injury and the medical evidence of record. He noted that appellant's hearing was essentially the same from July 29, 1976 to March 6, 1998 and that his hearing was worse as of January 24, 2008. Dr. Franklin opined that it was possible that appellant's workplace exposure was sufficient to cause appellant's hearing loss. He found mild mixed hearing loss that occurred after appellant's March 6, 1998 audiogram and explained that appellant's hearing loss was not due to his federal employment because it occurred after his retirement. Dr. Franklin recommended that appellant undergo further evaluation. He reviewed appellant's audiometric testing results and found at 500, 1,000, 2,000 and 3,000 Hertz (Hz) losses of 35, 35, 35 and 40 decibels (dBs) on the right, respectively; and 30, 30, 35 and 45 dBs on the left, respectively. Dr. Franklin found 15.3 percent binaural hearing loss and diagnosed mild-to-moderate sensorineural hearing loss. He recommended that appellant receive hearing aids to treat his hearing loss.

In a February 6, 2008 medical note Dr. A. E. Anderson, acting as a district medical adviser (DMA) agreed with Dr. Franklin, opining that appellant's hearing loss was not work related since it occurred after his retirement.

By decision dated February 7, 2008, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish that his hearing loss was causally related to the accepted factors of his federal employment.

In an October 25, 2019 letter, appellant noted that he underwent an audiogram and it was recommended that he obtain hearing aids to treat his bilateral mixed hearing loss. He attached an unsigned September 26, 2019 audiogram that diagnosed binaural severe-to-profound hearing loss. Appellant also attached an October 25, 2019 audiogram in which Dr. Molly Fenwick, an audiologist, recommended hearing aids.

On February 4, 2020 appellant requested reconsideration of OWCP's February 7, 2008 decision *via* an appeal request form signed by him on October 25, 2019.

By decision dated February 11, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[4] This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's

[4] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

decision for which review is sought.[5] The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.[6] Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).[7] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[8]

OWCP may not deny a request for reconsideration solely because the application was not timely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.[9] OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.[10]

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.[11] The Board notes that clear evidence of error is intended to represent a difficult standard.[12] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[13] It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.[14] This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.[15] In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[16] The Board makes an independent

[5] 20 C.F.R. § 10.607(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

[7] *Id*. at Chapter 2.1602.4(b) (February 2016).

[8] *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

[9] *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

[10] *Id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

[11] *G.G.*, *supra* note 9.

[12] *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* 8.

[13] *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

[14] *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

[15] *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

[16] *A.F.*, 59 ECAB 714 (2008); *D.G.*, 59 ECAB 455 (2008).

determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[17]

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[18] As appellant did not request reconsideration until February 4, 2020, more than one year after the issuance of its February 7, 2008 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its February 7, 2008 decision.[19]

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. OWCP denied his occupational disease claim because he had not submitted medical evidence containing a physician's opinion as to how his hearing loss was causally related to the accepted factors of his federal employment. The evidence submitted in support of appellant's request for reconsideration failed to raise a substantial question concerning the correctness of OWCP's February 7, 2008 decision.[20]

Appellant submitted an October 25, 2019 audiogram in which Dr. Fenwick recommended that he receive hearing aids. As Dr. Fenwick is an audiologist, she is not considered a physician as defined under FECA[21] on the issue of causal relationship.[22] Thus, her report is of no probative value. For this reason, Dr. Fenwick's October 25, 2019 audiogram is insufficient to demonstrate clear evidence of error.

The remaining medical evidence consists of an unsigned September 26, 2019 audiogram that diagnosed binaural severe-to-profound hearing loss. The Board has consistently held that a

[17] *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

[18] 20 C.F.R. § 10.607(a).

[19] *Id*. at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

[20] *See P.T.*, Docket No. 18-0494 (issued July 9, 2018).

[21] Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

[22] *See A.B.*, Docket No. 13-316 (issued June 20, 2013) wherein the Board noted that if a claim for hearing loss is accepted as causally related and the issue is one of ratability for a schedule award, an audiogram prepared by an audiologist may determine the percentage of hearing loss if the audiogram is accompanied by a physician's opinion certifying that the audiogram as accurate and that the audiologist properly determined the percentage of appellant's hearing loss by utilizing the approved standardized procedures.

report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician.[23] For this reason, the remaining medical evidence is also insufficient to demonstrate clear evidence of error.

None of the evidence submitted by appellant in connection with his untimely reconsideration request manifests on its face that OWCP committed an error in denying his occupational disease claim. He has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.[24] Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[23] *K.C.*, Docket No. 18-1330 (issued March 11, 2019).

[24] *Supra* notes 11 and 12.